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No. 92-510

Supreme Court of the United States

OCTOBER TERM, 1992

FEDERAL TRADE COMMISSION, CROSS-PETITIONER

v.

DETROIT AUTO DEALERS ASSOCIATION, INC., ET AL.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals misapplied the nonstatutory labor exemption to the antitrust laws in suggesting that the exemption might apply to firms that incorporated an anti-competitive agreement with other competitors into a collective bargaining agreement, or that joined the anticompetitive agreement in response to violence or force from unions or employees.

2. Whether the court of appeals departed from its proper reviewing role in remanding for the Federal Trade Commission to reconsider portions of its remedial order without having concluded that the order was legally or factually deficient.

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The Solicitor General, on behalf of the Federal Trade Commission, respectfully cross-petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-49a, is reported at 955 F.2d 457.[1] The opinion and order of the Federal Trade Commission (Commission), Pet. App. 50a-117a, and the initial decision of the administrative law judge, Pet. App. 118a-201a, are reported at 111 F.T.C. 417.

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[1] The parties to these proceedings are correctly set forth in the petition for a writ of certiorari in *Detroit Auto Dealers Ass'n, Inc.* v. *FTC*, No. 92-333 (at Pet. ii-viii). Citations to "Pet. App." are to the appendix to the petition in that case.

JURISDICTION

The judgment of the court of appeals, Pet. App. 204a-205a, was entered on March 4, 1992. The petitions for rehearing were denied on May 22, 1992. Pet. App. 202a-203a. The petition for a writ of certiorari in No. 92-333 was filed on August 20, 1992, and received by the Solicitor General on that date. This cross-petition is being filed pursuant to Rule 12.3 of the Rules of the Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The facts and proceedings below are set forth in the brief in opposition of the Commission filed in No. 92-333.

REASONS FOR GRANTING THE CROSS-PETITION

As explained in the Commission's brief in opposition in No. 92-333, to the extent that the court of appeals held that the nonstatutory labor exemption is inapplicable to this case, the decision is correct and does not warrant this Court's review. Outside of a collective bargaining or negotiation context, employers have no antitrust immunity to agree among themselves to restrict and standardize their retail business hours. Moreover, as the court of appeals noted, this case presents an issue that "differs materially from the relatively few cases which have analyzed and considered [the nonstatutory labor] exemption in other factual contexts." Pet. App. 18a. That factor as well suggests that this Court's review of the court of appeals' decision is not warranted.

If this Court were to grant the petition in No. 92-333, however, its review of the nonstatutory labor

exemption should encompass the court of appeals' ruling that the Commission must reconsider the applicability of the exemption to certain individual dealers. At best, that remand is erroneous because it forces the Commission to reevaluate a record that the Commission has already reviewed and found insufficient to support any nonstatutory exemption from the antitrust laws. At worst, the ruling reflects an overbroad notion of what the nonstatutory labor exemption protects, and could portend a troubling expansion of that exemption to agreements that should not be free from antitrust scrutiny. While these mistakes would not independently warrant review, if the Court grants the petition in No. 92-333, it should undertake a complete review of the court of appeals' application of the nonstatutory labor exemption.

Similarly, the court of appeals erroneously set aside portions of the Commission's remedial order, and suggested alternatives for the Commission's consideration, without concluding that the Commission had committed any legal error. As the dissenting opinion stated, the majority had "no authority—as distinguished from 'power'—to question the FTC's decision in this regard or to direct the Commission to 'rethink' " its order. Pet. App. 48a. If the Court were to grant review to consider petitioners' objections to the remedial order (which we believe would be unwarranted), it should also review the court's unjustified remand.

1. The nonstatutory labor exemption to the antitrust laws responds to the fact that if all agreements between unions and other parties were subject to the antitrust laws, the policy of federal labor law to promote negotiated agreements would be defeated. As

this Court has noted, "a proper accommodation between the congressional policy favoring collective bargaining under the NLRA [National Labor Relations Act] and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions." *Connell Constr. Co.* v. *Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 622 (1975); see *United Mine Workers* v. *Pennington*, 381 U.S. 657, 664-665 (1965); *Local Union No. 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676 (1965).

Under those precedents, the court of appeals correctly held that the dealers' agreement restricting and standardizing showroom hours cannot claim the protection of the nonstatutory labor exemption, as that agreement was reached outside of the context of collective bargaining or negotiations with the dealers' employees or their representatives. Nevertheless, the court of appeals ordered a remand for the Commission to consider whether certain *individual* dealers who had entered into collective bargaining arrangements were entitled to claim the exemption. That order rests on insupportable factual and legal premises.

a. The court of appeals stated that an individual dealer could claim entitlement to the nonstatutory labor exemption if it could show that "direct negotiations and collective bargaining with salesperson employees or their representatives * * * actually brought about additional or different limits on showroom hours of operation." Pet. App. 22a. That analysis is incorrect for the basic reason that the agreement found unlawful by the Commission, and before the court for review, was the agreement between *dealers*; it is no defense to entry into that agreement

that an individual dealer had separately negotiated restrictions on hours with its employees.[2]

Moreover, even if the existence of separate collective bargaining agreements were relevant, the Commission addressed that issue and found that no agreements were reached here that independently regulated hours. Pet. App. 60a-61a, 72a-73a. The Commission explained that in the few collective bargaining agreements that were reached with particular dealers, the unions failed in their efforts to require shorter hours, and "most of the contracts expressly reserved to management the right to determine the business hours of the dealership." *Id.* at 60a. Other agreements contained "maintenance of standards" provisions, which required shorter hours only to the extent that they had been imposed by prior collusive action by the dealers. *Id.* at 60a-61a. As the Commission explained, such provisions "do not incorporate bargained-for hours, but instead perpetuate [the dealers'] unlawful concerted action." *Id.* at 96a. The Commission therefore rejected the claim that any collective bargaining agreements in this case established showroom hours

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[2] The court recognized that point in stating that "[t]he agreement before the Commission and before us now, without question, is the 'agreement among dealers to establish uniform showroom hours.'" Pet. App. 22a. As the Commission noted, "this agreement is completely separate from whatever negotiations may have gone on at individual dealerships." *Id.* at 73a. Nevertheless, the court inexplicably went on to find it "material for the FTC to consider whether separate dealer-union agreements existed with unions which 'contained bargained-for hours restrictions,' which were the product of genuine collective bargaining." *Id.* at 22a. *Jewel Tea* offers no support for the court's remand. In that case this Court upheld a collectively bargained restraint on marketing hours; here, the *dealers'* agreement was not collectively bargained.

independent of the preexisting collusion by dealers to shorten and standardize hours. As Judge Ryan noted in dissent, the majority erred in requiring the Commission to revisit this finding. *Id.* at 35a-37a.

b. Although the court of appeals' remand is limited to those dealers who entered into separate collective bargaining agreements and the basic thrust of the opinion is that the Commission should determine whether bona fide individual bargaining over hours occurred, Pet. App. 21a-22a, other statements in the court's opinion suggest more broadly that a dealer's adoption of shorter hours "under force and threats of vandalism, violence, picketing and property damage," *id.* at 23a, could show that "there was a restraint on hours of showroom operation imposed by a union rather than by the collective agreement with and among the other dealers or the association," and that this would bring the nonstatutory labor exemption into play. *Id.* at 24a. To the extent that the court endorsed that view, its reasoning is seriously flawed.

In *Connell*, this Court refused to apply the nonstatutory exemption to an anticompetitive agreement between a union and a contractor when there was no collective bargaining relationship between the parties and the union employed economic coercion to induce the contractor to sign the agreement. This Court held that "[t]he federal policy favoring collective bargaining * * * can offer no shelter for the union's coercive action." 421 U.S. at 626. It would similarly give the nonstatutory exemption an improper scope to extend it to employers who joined an anticompetitive agreement with other employers as a means of defusing

tension brought about by labor violence or threats.[3] A sound application of the nonstatutory labor exemption is inconsistent with the view that an employer may collude with its horizontal competitors to restrict competition in order to escape violent union pressure. See *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 465 (1986) ("That a particular practice may be unlawful is not, in itself, a sufficient justification for collusion among competitors to prevent it.").

The decisions of other courts of appeals lend no support to the view that an anticompetitive agreement among employers resulting from union force or violence is protected by the nonstatutory labor exemption.[4] The only decision cited by the majority is *Richards* v. *Neilsen Freight Lines*, 810 F.2d 898 (9th Cir. 1987), but that case is quite different from this

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[3] Petitioners have never contended that particular dealers unilaterally shortened showroom hours in response to union violence or force. Rather, their consistent position has been that "there was no solution to the lengthy labor dispute other than uniform [*i.e.*, concerted] reductions of sales hours." 92-333 Pet. at 5. Indeed, the record indicates that some dealers resisted evening closings absent assurances that their competitors would also close, for the obvious reason that they would otherwise lose business. Pet. App. 80a-81a & n.19, 125a.

[4] For example, in *Mackey* v. *National Football League*, 543 F.2d 206 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977), the court held that to invoke the nonstatutory exemption, it must be shown that: (1) any trade restraint "primarily affects only the parties to the collective bargaining relationship"; (2) the agreement concerns a mandatory subject of collective bargaining; and (3) the agreement is the product of "bona fide, arm's-length bargaining." 543 F.2d at 614. That test, if applied here, would not support the court of appeals' remand to the Commission.

one. *Richards* concerned a union's attempt to organize a firm by pressuring three of that firm's customer-competitors "not to utilize the services of" the union's target. 810 F.2d at 906. In holding that the union and the three customer-competitors could invoke the labor exemption, the court stressed that the *union-led* trade restraint was protected because (a) the restraint arose from "discrete, bilateral agreements" between the union and the competitors, who did not agree among themselves; (b) the union did not "freeze the terms by which a large portion of the industry conducted business"; and (c) the union "did not enable any business entity to eliminate troublesome competition." *Ibid.* The standardization of dealers' hours in Detroit, through an *employer-led* agreement without collective bargaining, does not satisfy any of the conditions noted in *Richards*.

In sum, by requiring the Commission to reevaluate an issue that it already determined—that individual dealers did not impose shorter hours as a result of individual collective bargaining agreements—the court of appeals' remand is unwarranted. To the extent the court may have endorsed a broader theory, entitling dealers to establish that their anticompetitive conduct was justified by union violence, the remand is legally incorrect.

2. The court of appeals' remand also departed from the proper role of a reviewing court by requiring the Commission to reconsider its remedial order even though the court found no legal flaw in it. The court expressed concern that the requirement that dealerships stay open for 64 hours per week for one year is "overly broad and intrusive on the manner of operation, and without a reasonable relation to the practices condemned," but did not hold it invalid;

rather, the court simply "suggest[ed]" that the Commission consider allowing dealers the option of opening for an average of ten-and-one-half hours each weekday, plus some minimum time on Saturdays, for the one year period. Pet. App. 32a. The court also suggested that the Commission reconsider whether 30 days would be sufficient for the dealers' trade associations to investigate and expel a member who violated the order by discussing showroom hours, even though the dealers had not challenged that provision. *Ibid.*

The remand arrogates to the judiciary the Commission's function of devising remedies. Unless the Commission's remedy "has no reasonable relation to the unlawful practices found to exist" or constitutes an abuse of discretion, the remedy must be upheld. *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 613 (1946); *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952). It is a basic tenet of administrative law that courts must defer to an agency's judgment regarding remedies, not improvise their own. See *ICC* v. *American Trucking Ass'ns*, 467 U.S. 354, 364-365 (1984); *Virginia Elec. & Power Co.* v. *NLRB*, 319 U.S. 533, 539-540 (1943). Here, the Commission's orders were reasonably framed to remedy the violations found. It was not within the court's authority to propose that the Commission consider alternatives that the court surmised might reflect a better approach.

CONCLUSION

If the Court grants the petition in No. 92-333, it should also grant this cross-petition. If the Court denies the petition in No. 92-333, this cross-petition should also be denied.

Respectfully submitted.

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ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE DETROIT AUTO DEALERS ASSOCIATION, INC., *ET AL.*, IN OPPOSITION

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BRIEF FOR THE DETROIT AUTO DEALERS ASSOCIATION, INC., *ET AL.*, IN OPPOSITION TO THE CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Dealers hereby jointly oppose the cross-petition of the Federal Trade Commission for a writ of certiorari.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on March 4, 1992, in accordance with an opinion of the court filed on January 31, 1992. It is reported at 955 F.2d 457 (6th Cir. 1992). It is reprinted 1a-49a.

A timely petition for rehearing and suggestion of rehearing en banc was denied by order filed on May 22, 1992. 202a-203a.

The initial decision of the Federal Trade Commission administrative law judge and the opinion and order of the Federal Trade Commission are reported at 111 F.T.C. 417 (1989), and reprinted at 118a-201a and 50a-117a.

JURISDICTION

The petition for writ of certiorari in No. 92-333 was filed and served on August 20, 1992. The Cross-Petitioner Federal Trade Commission relies on Rule 12.3.

Jurisdiction is conferred by 28 U.S.C. § 1254 (1).

Jurisdiction in the United States Court of Appeals for the Sixth Circuit was based upon 15 U.S.C. § 45 (c).

STATEMENT

The facts and proceedings below are set forth in the petition of the Dealers filed in No. 92-333.

ARGUMENT

The Federal Trade Commission acknowledges that if this Court denies the petition for certiorari filed by the Dealers in No. 92-333, then the issues raised by the FTC do not independently warrant certiorari. Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit ("FTC Pet.") at 3, 10. The Dealers agree. See Supreme Court Rule 13.5. The Dealers further assert that the FTC has failed to raise any issues that merit consideration by the Court even if the Court grants the Dealers' petition in No. 92-333.

I. The Sixth Circuit Appropriately Remanded for Determination Whether Any Dealer Reduced Hours As a Result of Collective Bargaining or Violence and Force

The FTC argues that the Sixth Circuit erred in remanding to determine whether any individual Dealers reduced their

hours as a result of collective bargaining with a union or of union-directed violence and force. The court's remand, however, is exactly what should have happened *assuming the court accepted the arguments made by the FTC itself.* Because the remand is consistent with the FTC's own position, the FTC has pointed to no prior decision of this Court or any United States court of appeals that conflicts with it.

The FTC's position is that the nonstatutory exemption exists solely to further the public interest in collective bargaining and negotiations.[1] Brief for the Federal Trade Commission in Opposition to Petition for Writ of Certiorari in No. 92-333 ("FTC Opp. Br.") at 4. The FTC further asserts that the agreement in this case was "an *employer-led* agreement without collective bargaining," and thus not exempt. FTC Pet. at 8. [emphasis in original] The remand merely seeks to have the FTC determine whether in fact each participant joined the agreement without collective bargaining under circumstances which can fairly be termed employer-led. As explained by the court, "we remand for the Commission to determine whether there was a restraint on hours of showroom operation imposed by a union rather than by the collective agreement with and among the other dealers or the association." 24a.

There is no dispute that some Dealers entered into collective bargaining agreements with their unionized employees. The FTC conceded that *some* of these agreements imposed hours reductions. In what appears to be an effort to buttress its decision, the FTC phrased its finding in the negative:

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[1]The Dealers dispute this view, which so restricts the scope of the exemption as to frustrate valid policies of the labor laws by discriminating against non-union employees and their employers. Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit in No. 92-333 ("Dealer Br.") at 8-16, and Reply to Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit in No. 92-333 at 2-3.

"most of the contracts [with the Automotive Salesmen Association] expressly reserved to management the right to determine the business hours of the dealership." 60a. The use of the word "most" clearly implies that fewer than all of the contracts reserved the question of hours, *i.e.*, some of them imposed reductions in hours. This implication is more explicit at 73a, n.13, where the FTC identifies one dealership with a collective bargaining agreement that required a reduction of hours. The FTC discussed that agreement only to the extent of concluding that one contract cannot exempt all of the Dealers.[2] But the FTC did not consider whether that individual dealership (or any other similarly situated dealership) should be exempt. One of the issues on which the Sixth Circuit remanded is the one the FTC failed to address, which is whether that dealership, or any other dealership, reduced hours as a result of a collective bargaining agreement rather than of the alleged agreement among Dealers.

The second aspect of the issue remanded (*i.e.*, whether any Dealers were forced to close as a result of union-led violence) is to determine if, as argued by the FTC, each Dealer's reduction of hours was "employer-led." This is a significant issue. Both the Dealers and the FTC recognize that an agreement is more likely to be exempt if it results from a demand of the employees than if it is instigated by employers (though the parties disagree on the other criteria for the exemption). The

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[2]The conclusion is wrong. In several prior cases employers who did not engage in negotiations or enter into collective bargaining agreements were nonetheless exempt because they engaged in concerted actions with other employers who were enaged in collective bargaining. *Amalgamated Meat Cutters & Butchers Workmen of North America, Local Union No. 576 v. Wetterau Foods, Inc.*, 597 F.2d 133 (8th Cir. 1979); *Newspaper Drivers & Handlers' Local No. 372 v. NLRB*, 404 F.2d 1159 (6th Cir. 1968), *cert. denied*, 395 U.S. 923 (1969); *Plumbers & Steamfitters Local 598 v. Morris*, 511 F.Supp. 1298 (E.D. Wash. 1981).

FTC, for example, relies heavily on *Mackey v. National Football League*, 543 F.2d 206 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977). In *Mackey*, the exemption was denied because the concerted restriction was imposed to further the employers' business objectives rather than the employees' labor objectives. In other words, it was "employer-led" instead of "employee-led."

The Sixth Circuit agreed that the source of the impetus for closing is significant. It remanded to determine which Dealers, if any, were compelled to close by union directed violence and force; that is, which Dealers closed as a result of union-led activity rather than employer-led activity. This was not addressed by the FTC in its decision.

The FTC recognized the coercive tactics of the employees, 58a-61a, but did not consider whether those coercive tactics caused any individual Dealer to reduce its hours. The remand will require the FTC to address this issue, which its own brief demonstrates is important.

II. The Court Appropriately Remanded the Case for Reconsideration of the Order

Contrary to the FTC's argument on page 9, the Sixth Circuit did not require the FTC to change any provisions in the order it issued or to substitute any provisions suggested by the court. It merely required the FTC to consider important matters concerning the breadth and burden of the order which it had overlooked prior to issuing it. A remand for this purpose does not conflict with any prior decision of this Court or of any other United States court of appeals. On the contrary, this is an appropriate action for the court to take. The failure to consider an important factor before issuing an order is an abuse of discretion. *Motor Vehicle Manufacturers*

Association v. State Farm Mutual Insurance Co., 463 U.S. 29, 43-44 (1983).

If on remand the FTC considers the order provisions fully and fairly in light of the surrounding circumstances, it may then exercise its discretion in a lawful manner. It may then (though the Dealers expect it will not) even re-issue the same order.[3] That is, it is not necessarily the order which the court rejected, but the pro forma manner in which the FTC imposed it. A remand for that purpose is entirely proper.

[3]The court recognized that there are serious flaws in the order which the FTC is likely to perceive if it gives the order more than a cursory glance. It requires Dealers to be open for 64 hours every week of the year, including, for example, the week of December 21. During that week, the Dealers will be closed on Sunday, as required by state law. No employee will work Christmas Eve or Christmas Day. It would be virtually impossible to remain open 64 hours that week, or the weeks of New Years or Thanksgiving.

CONCLUSION

The cross-petition for writ of certiorari should be denied.

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